IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 11-01-2007

Coram

The Honourable Mr.Justice A.C.ARUMUGAPERUMAL ADITYAN

Second Appeal No.157 OF 1997

Venkatasami ..Appellant/Plaintiff.

vs.

1.Govinda Gowdu
2.Gurrappa
3.Kakasuradu ..Respondents/1st and 2nd Defendant Respondents/3rd Defendant.

This Second appeal was filed under Section 100 CPC against the decree and judgment dated 12.08.1996 made in A.S.No.29 of 1996 on the file of the Court of the Subordinate Judge, Hosur, reversing the decree and judgment made in O.S.No.359 of 1980 dated 1.2.1995 on the file of the Court of the District Munsif, Hosur.

For Appellant : Mr.D.J.Venkatesh for Mr.V.Raghavachari

For Respondent : Mr.V.Sekar for Mr.D.Shivakumaran

JUDGMENT

This appeal has been preferred against the decree and judgment in A.S.No.29/1996 on the file of the Subordinate Judge, Hosur, by the plaintiff in O.S.No.359/1980 on the file of the Court of District Munsif, Hosur, who has got decree in his favour before the trial Court and subsequently lost his case in the appeal preferred by the defendants 1 & 2 before the first appellate Court.

2. The suit was filed for declaration of the plaintiff's possessory right in respect of the suit property and also for delivery of possession from the defendants and for mesne profit. The averments in the plaint in brief relevant for the purpose of deciding this appeal are as follows:-

The suit property belong to one Ellapa Chetty of Beerje Pallim, who had three sons. The suit property is a highways poramboke bearing S.No.539. The suit property comprises of a house and vacant site. The

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said house was constructed some 20 years back by Ellappa Chetty. The revenue department after collecting 2 cess have recognised the possession of the Ellappa Chetty in respect of the suit property. Apart from the house of Ellappa Chetty, the houses of Nasigan, Muniyappan and Maligachari are also stand in S.No.539. At the time of partition of the property belonging to Ellappa Chetty the suit property was originally allotted to one Subramanian towards his share. Since the said Subramanian was residing at Bangalore, the suit property was looked after by his brother Sathiyanarayana Reddy. The said Subramanian had executed a sale deed in favour of the plaintiff on 8.8.1980 in respect of the suit property for a consideration of Rs.1,000/-. From on that date onwards the plaintiff is in possession and enjoyment of the plaint schedule property. The defendants have no right or title in respect of the suit property. The attempt made by the defendants to purchase the suit property ended futile. Hence, the defendants have developed a grudge against the plaintiff. The defendants are attempting to disturb the possession of the plaintiff over the plaint schedule property. The first defendant with the grosser of defendants 2 & 3, trespassed into the suit property in the year 1981 at the time when the plaintiff was away from the suit property. The second defendant has trespassed into the front portion of the house in the suit property and the third defendant has trespassed into the back portion of the suit property. Inspite of several panchayats took place between the parties, the defendants have refused to vacate and handover the possession of the suit property. Hence, the plaintiff has impleaded defendants 2 & 3 in the array of parties. Hence, the suit.

3. The defendants 2 & 3 remained exparte. The first defendant in his written statement would contend that the house in the suit property is a common house. Neither the vendor of the plaintiff nor the plaintiff had any exclusive right in respect of the said house. Ellapa Chetty has not constructed the suit house and he was never in possession and enjoyment of the said house and under the sale deed cannot claim any right in respect of the suit property. The vendor of the plaintiff had no right of his own to convey the same in favour of the plaintiff. The said sale deed is a concocted document. Since the suit property is a road poramboke, the plaintiff cannot claim any right in respect of the suit property. For the convenience of the public the defendants have constructed a shed near the suit property some 15 years back. The said shed was used by the defendants and those who do not have any house used to dwell in the said shed. The suit property is still with the possession of the defendants. The suit property is being used by the public as a 'rest house'. After obtaining an order of interim injunction the plaintiff is making all attempts to enter into the plaint schedule property. Only to grab at the plaint schedule property the plaintiff has filed this vexatious suit. The plaintiff has examined P.W.1 to P.W.4 and exhibited Ex.A.1 to A.4. On the side of the defendants D.W.1 & D.w.2 were examined and Ex.B.1 and Ex.B.2 were marked. A Commissioner was appointed by the trial Court, who had filed Ex.C.1-report and Ex.C.2-plan.

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4. On the above pleadings the trial Court has framed four issues and on the basis of the available documentary and oral evidence, the trial Judge has come to a conclusion that the plaintiff is entitled to the relief as prayed for in the plaint and consequently decreed the suit with costs. Aggrieved by the findings of the learned trial Judge, the defendants 1 & 2 have preferred A.S.No.129/1996. The learned first appellate judge after giving due deliberation to the submissions made by both the parties and after going through the documentary and oral evidence let in before the trial Court, accepted the case of the appellant and allowed the appeal thereby dismissed the suit. Hence, the second appeal before this Court by the plaintiff.

5. The substantial question of law involved in this second appeal is whether the lower appellate court has misconstrued the evidence of D.W.1 and also failed to notice that adjunct to the matam is the suit property and it is in the possession of the plaintiff/appellant?

6.The point:- I have heard the submissions made by Mr.Venkatesh, who argued on behalf of his senior Thiru.Rahavachari, learned counsel for the appellant and Mr.Sekar, who argued on behalf of Mr.Sivakumaran, learned counsel for the respondents and considered their rival submissions. The appeal by the plaintiff cannot be allowed for the following reasons:-

(i) Admittedly the suit property is a highway poramboke. In the cause of action column in the plaint, the plaintiff has stated that he had purchased the suit property under Ex.A.1-sale deed dated 8.8.1980 and Ex.A.2-Correction deed dated 6.10.1980. It is the case of the appellant/plaintiff that the suit property was originally possessed by one Ellappa Chety, who had partitioned his property along with his sons in which the suit property was allotted to one of his sons Subramanian, who was residing at Bangalore and that the said Subramanian had executed Ex.A.1-sale deed. Ex.A.1 is in Telugu and the Tamil translation copy has been attached with Ex.A.1, which on translation in English reads as follows:-

> "The property sold under Ex.A.1 is bearing Natham S.No.529 measuring 1.5 cents comprising a house. It cannot be disputed that the Government is the paramount holder of title in respect of Natham poramboke land.

But in this case, Government was not arrayed as a party. Under Order 1 Rule 9 of CPC also the claim of the plaintiff cannot be upheld because of non-joinder of necessary party subsequent to the amendment of CPC under Act 104 of 1976. To show his possession the plaintiff relied on Ex.A.3 and Ex.A.4. Ex.A.1 is in the name of one Sathiyanarayana son of Ellapa Chety and also in the name of Ellapa Chety. A reading of the recital in Ex.A.1 will go to show that the property sold under Ex.A.1 was an ancestral property of the said Subramanian. In the plaint it has been stated that under a partition between Ellapa Chety and his sons, Subramanian was allotted with the plaint schedule property. But there was no document produced to show that subsequent to the oral partition between

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Ellapa Chety and his sons mutation has been effected in respect of the suit property in favour of Subramanian. No tax receipt in the name of Subramanian was produced to show that after the allotment by the partition, Subramanian, the vendor of the plaintiff, was in exclusive possession and enjoyment of the suit property. Ex.A.3(series) stands in the name of Sathiyanarayana. There are several corrections in Ex.A.3 (series)-tax receipts.

(ii) The learned counsel for the appellant would contend that Sathiyanarayana, who is none other than the brother of Subramanian, had paid the tax on behalf of Subramaniyan. P.W.2 is Sathiyanarayana. In the cross-examination he would depose that he does not know whether the suit property has been mentioend in Ex.A.1 and A.3 as ancestral property or highways poramboke. He has further deposed in the cross-examination that there were documents to show that his father had constructed house in poramboke land. The house tax receipts produced under Ex.A.4 are all subsequent to the filing of the suit which ws filed in the year 1980. The learned first appellate Court has given a clear finding that the vendor under Ex.A.1 in favour of the plaintiff in respect of the suit property himself has no right to execute sale deed in respect of the suit property because the suit property is in highway poramboke. Futher it is pertinent to note from Ex.C.2, Commissioners plan, that the plaintiff's house is situated North of the suit property. Ex.C.1-report at para 4, the Commissioner has clearly stated that house marked as "A" and "C" in Ex.C.1-plan are in the suit place which are Mangalore tiled house and the vacant site lying in between house "A" and "C" has been marked as "B" in Ex.C.2-Plan. The learned Commissioner has further stated that Gurapa-D2 was not available in the house belonging to him, which has been marked as "A" in the Ex.C.2-Plan, but one Munima was present in the house marked as "C" to Ex.C.2-Plan. So it is clear from Ex.C.1-report and Ex.C.2-Plan that D2 and another person by name Munima are residing in the house situated in the suit property.

(iii) The learned counsel appearing for the appellant relying on 2004(1) SCC 769 [Rame Gowda (dead) By LRs. Vs. M.Varadappa Naidu (dead) by LRs. And another], and contended that the settled possession of an occupant cannot be dispossessed without recourse to law. What is a settled possession has been defined in the said judgment by the learned judge of the Honourable Apex Court relying on an earlier judgment of the Apex Court in 1975 (4) SCC 518, (Puran Singh Vs. State of Punjab), as follows;-

> "The settled possession must be (i) effective, (ii) undisturbed, and (iii) to the knowledge of the owner or without any attempt at concealment by the trespasser. The phrase 'settled possession' does not carry any special charm or magic in it; nor is it a ritualistic formula which can be confined in a straitjacket. An occupation of the property by a person as an agent or a servant acting at the instance of the owner will not amount to actual physical possession. The Supreme Court in Puran Singh Case, (1975)4 SCC 518, 527, para 12, has laid down test which may be adopted as a working rule for determining the

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attributes of 'settled possession'.

Settled possession gives a right to possession such that even the rightful owner may only recover it by taking recourse to law. . . . . .
. . . . . .
It is the settled possession or effective posession of a person without title which would entitle him to protect his possession even as against the true owner. The concept of settled possession and the right of the possessor to protect his possession against the owner has come to be settled by a catena of decisions. Illustratively, we may refer to AIR 1968 SC 702 (Munshi Ram Vs. Delhi Adman), 1975(4) SCC 518) (Puran Singh Vs. State of Punjab) and 1977(1) SCC 188 (Ram Rattan Vs. State of UP). The authorities need not be multiplied. IN Munshi Ram case it was held that no one, including the true owner, has a right to dispossess the trespasser by force if the trespasser is in settled possession of the land and in such a case unless he is evicted in the due course of law, he is entitled to defend his possession even against the rightful owner. But merely stray or even intermittent acts of trespass do not give such a right against the true owner. The possession which a trespasser is entitled to defend against the rightful owner must be settled possession extending over a sufficiently long period of time and acquiesced to by the true owner. A casual act of possession would not have the effect of interrupting the possession of the rightful owner. The rightful owner may reenter and reinstate himself provided he does not use more force than is necessary. Such entry will be viewed only as resistance to an intrusion upon his possession which has never been lost. A stray act of trespass, or a possession which is not matured into settled possession, can be obstructed or removed by the true owner even by using necessary force. In Puran Singh Case the Court clarified that it is difficult to lay down any hard-and-fast rule as to when the possession of a trespasser can mature into settled possession. The 'settled possession' must be (i) effective, (ii) undisturbed, and (iii) to the knowledge of the owner or without any attempt at concealment by the trespasser. The phrase 'settled possession' does not carry any special charm or magic in it; nor is it a ritualistic formula which can be confined in a straitjacket. An occupation of the property by a person as an agent or a servant acting at the instance of the owner will not amount to actual physical possession."

(iv)At least to come within the protection and shelter of the phrase 'settled possession', the plaintiff must show his possession on the date of filing of the suit. But Ex.A.4(series)-tax receipts will go to show that the bunch of house tax receipts produced by him are all

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subsequent to the filing of the suit and not even a single receipt dated before the suit has been produced in the name of the plaintiff before the trial Court to show that the plaintiff is in possession and enjoyment of the house situated in the suit property even before filing of the suit. Ex.C.1-Commissioner's report and Ex.C.2-plan will to go show that the second defendant and another woman are residing in the house shown as "A" and "C" respectively in the suit property and that the plaintiff's property is situated North of the suit property. Further it is admitted that the suit property is a highways poramboke. It is not the case of the plaintiff that he is in possession of the suit property hostile to the interest of the original owner viz. Government for more than the statutory period. Under such circumstances, I do not find any valid reason to interfere with the well considered judgment in A.S.No.29/1996 on the file of the Court of Subordinate Judge, Hosur. The learned counsel for the appellant would represent that this court may give him liberty to file a fresh suit adding the Government as a party. Such a direction cannot be given by this Court. It is left to the plaintiff to take on his own accord the right decision. Point is answered accordingly.

7. In the result, I find no merit in this appeal and the appeal is dismissed with costs confirming the decree and Judgment in A.S.No.29/1996 on the file of the Court of Subordinate Judge, Hosur.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

ssv

To
1.The Sub-Judge, Hosur.

2.The District Munsif, Hosur.

3. The Section Officer, VR Section,
High Court, Madras.

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+ 1 CC To Mr. D.Shivakumaran, Advocate SR NO. 2385/07

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